**IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL**

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

CRIMINAL APPEAL – 245/2003

Yogdamber Singh

Versus

State

Date of decision :- 19-7-2005

A.F.R. (Approved for Reporting)
~~Not approved for reporting~~

Date :- 19.7.2005 Initial of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

**IN THE HIGH COURT OF UTTARANCHAL**

**AT NAINITAL**

**CRIMINAL APPEAL NO.245 2003**

Yogdamber Singh alias Dabbu
S/o Alam Singh
R/o Nazibabad Road, Kotdwara,
Police station-Kotwar
District Pauri.

……Appellant

**Versus**

State of Uttaranchal …..Respondent

Mr. Pankaj Purohit learned counsel for the appellant
Sri Lalit Verma learned AGA for the State.

**Hon'ble J.C.S. Rawat, J.**

**1.** This Criminal appeal against the judgment and order dated 04.08.2003 passed by Sri P.K. Agrawal, the then Sessions Judge Pauri in S.T. No. 41 of 2002 State Vs. Yogamber alias Dabbu, whereby the learned Sessions Judge convicted and sentenced the appellant to undergo R.I. for a period of seven years under section 307 IPC and a fine of Rs.5000/-. In default of payment of fine, the appellant would undergo six months additional imprisonment.

**2.** The prosecution case, in brief, is that on 13.04.2002 at about 10:30 a.m. the complainant Dhanveer Rana (PW-3) along with Ganesh (PW-1) Meharban Singh (PW-2) and Jaipal went to the shop of Kotnala Furniture, Kotdwara. The shopkeeper brought tea for them. In the meantime at 11:15 a.m. the appellant came there and fired 4-5 times by his revolver with intention to kill Meharban Singh (PW2).

**3.** The injuries of Ganesh (PW1) were examined by Dr. J.C.Dhyani (PW5) Medical Officer, Government Hospital Kotdwar, district Pauri on 13.4.2002 at 11.30

A.M. vide injury report Ex.ka4. The following injuries were found on his person:-

(1) Lacerated oval shaped wound, 1cm x 1cm, depth not probed, over right side of back of chest about 10 cm below inferior angle of right scapula. Margins of wound were scorched and inverted. Fresh bleeding was oozing from the wound.

Detailed examination was not possible because general condition of the patient was poor.

The injuries were kept under observation and x-ray was advised.

The injuries of Dhanveer Rana(PW3) were examined by Dr. J.C. Dhyani (PW5) Medical Officer, Government Hospital Kotdwar, district Pauri on 13.4.2002 at 11.40 A.M. vide injury report Ex.ka5. The following injuries were found on his person:-

(1) A lacerated wound of 1.0 cm diameter. Oval shaped, depth of the wound could not be probed, over left side of face maxillary area. Margins of wound were inverted and scorched. Fresh blood was oozing out of wound.

(2) Another lacerated wound 1.0 cm x 0. 25 cm about 1.0 cm below left ear. Fresh blood was oozing out of wound.

Detailed examination was not possible because general condition of the patient was poor.

The injuries were kept under observation and x-ray was advised.

In the opinion of the doctor the injuries of both the injured persons were caused by firearm and duration was fresh.

**4.** The doctor informed the police regarding medico legal injuries of the above two injured persons vide memo Ex. ka6.

**5.** Dhanveer Singh Rana (PW3) submitted written report (Ex.ka1) at P.S. Kotdwar on 13.4.2002 at 12.10 P.M. The distance between the place of occurrence and the police station is one kilometer. Constable Rakesh Chandra on the basis of written report prepared FIR (Ex.ka6, and Chick report Ex.Ka7) and registered a case in G.D. vide Ex.Ka 8. The investigation was entrusted to S.I. Jawahar Lal (PW6) who went to the place of occurrence. He prepared memo Ex.Ka2 regarding recovery of one pellet and one match stick and also prepared memo (Ex.Ka3) regarding taking into possession the sample of simple earth and blood stained earth from the place of occurrence. He also prepared site plan Ex.Ka9. After completing the investigation the investigating Officer submitted chargesheet (Ex.Ka10) against the appellant.

**6.** Charge was framed against the appellant u/s 307 and 324 IPC to which he pleaded not guilty and claimed to be tried.

**7.** The prosecution in support of its case examined PW-1 Ganesh injured, PW2 Meharban Singh eye-witness, PW3 Dhanveer Rana (injured) is the complainant and proved written report Ex.ka1, PW4

Jaipal Singh is the eye-witness, PW5 Dr. J.C.Dhyani proved injury reports Ex.ka4 and Ex.ka5 of Ganesh and Dhanveer Rana respectively. PW6 Jawahar Lal proved Ex.ka6 (FIR), Ex.Ka7 chick report, Ex.Ka8 (GD entry), Ex.Ka9 site plan and Ex.Ka10 charge sheet.

**8.** In the statement recorded u/s 313 Cr.P.C. the appellant denied the prosecution case and stated that he has been falsely implicated in this case due to enmity. Meharban Singh (PW2) is a liquor Mafiya.

**9.** The learned trial court after appraisal of the evidence on record found the appellant guilty u/s 307 IPC and convicted and sentenced the appellant as mentioned above.

**10.** I have heard the learned counsel for the parties and perused the evidence on record.

**11.** Ganesh Kotnal PW1, Dhanveer Rana PW3 are the injured witnesses who sustained injuries during the incident. Meharban Singh PW2 and Jaipal PW4 are the eye-witnesses who had seen the occurrence. The prosecution evidence in nut shell is that on the date of

occurrence at 11.15 a.m. Meharban Singh PW2, Dhanveer Rana PW3 and Jaipal Singh PW4 went to the shop of Kotnal Furniture Kotdwar. The owner of the shop was Ganesh Kotnal PW1. The shopkeeper brought the tea for them. In the mean time the appellant came there and fired 5-6 times by his revolver with intention to kill them. The injured witnesses were examined by Dr. J.C.Dhyani PW5 who found the injuries on their person as indicated in para no.3 of the judgment. Ganesh Kotnal PW1 appeared before the court below

and narrated the entire incident but he did not state in his evidence with regard to the participation of the appellant in the said incident. He stated that a man having a blackening on his face came to him and he asked him to remain there and asked not to move. The man immediately fired upon them. PW1 Ganesh Kotnal has not named the appellant in his evidence. The witness was cross-examined by the prosecution and the statement alleged to have been recorded u/s 161 Cr.P.C. was put to him. However, that statement was not proved by the Investigating Officer. Ganesh Kotnal P.W.1 has categorically stated that he has not given that statement. If the statement has not been proved by the Investigating Officer, it does not carry any weight. It is well established position of law that the evidence of a hostile witness can also be relied to the extent, it supports the prosecution version. The evidence of such witness cannot be treated to be washed of the record. It remains admissible in the trial and there is no legal bar to base the conviction on the testimony of a hostile witness. The very object of taking evidence is to discover the truth as far as it is

humanly possible for the court to do so. The fact, therefore, that sound public policy requires that a party should not be permitted to malign his won witness, cannot and does not absolve the Court of its own high duty of attempting to discover the truth. Even when a witness deposes in favour of the case of the party calling him, the court on a consideration of his evidence may either believe or disbelieve him. Even in such a case, the Court has power and duty of deciding whether or not to believe the witnesses. In this case, PW1 Ganesh Kotnal has corroborated the incident. He has not only stated about the participation of the appellant.

**12.** It is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less a developing one, like ours, where the ratio of decline is higher. Even in ordinary cases the witnesses are not inclined to depose or their evidence is not found to be credible by the Courts for many fold-reasons. One of the reason may be that they do not have the courage to depose against an accused because of threat to their life, more so when the offenders are habitual criminals or high-ups such instances are also not uncommon where a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent. Thus the public prosecutor in an ordinary case has to face with so many odds. The courts while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in an ivory tower. In this case, the

witness PW1 has not named the appellant. However, he has corroborated the incident. The witness is as shopkeeper and businessman of Kotdwar. It may be pertinent to mention that Ganesh Kotnal wanted to remain indifferent clear to the provocation circumstances or he could not have the courage to depose against the appellant because of threats or reason best known to him. The other witnesses Meharban Singh PW2, Dhanveer Singh PW3 and Jaipal Singh PW4 have corroborated the incident and have proved the factum that the appellant fired upon the complainant party.

**13.** The learned counsel for the appellant contended that the incident took place in the main market and the prosecution has produced only interested witnesses

who are associated with Meharban Singh. The prosecution could have procured the witnesses from the locality because the incident took place at about 11.15 AM when the market was open. It is natural that when incident took place many people would have come at he seen of occurrence. The prosecution should have adduced the evidence of other witnesses also. It is not always necessary to multiply the evidence of the incident on the same point. It has to be seen what is the quality of the witnesses. It is the quality of the evidence and not the quantity, which is required. It is the evidence available on record is otherwise satisfactorily in nature and can be said to the trustworthy and increase in the number of witnesses cannot be turned up as the requirement of the case. The witnesses if they are participating in that event their evidence cannot be thrown out rightly on the

ground that the other locality witnesses have not been produced. The courts have to more carefully examine the evidence of interested witnesses. If the witnesses are trustworthy then it is not required that there should be a multiplicity of evidence.

**14.** I am forfeited with the view taken by the Apex Court in the following two decisions.

**15.** It has been held in **Komal and others Vs. State of U.P. 2002 SCC (Cri) 1600** as under:-

> *“Learned counsel next contended that though, according to the statements of witnesses, some villagers had arrived at the place of occurrence when the members of the prosecution party were begin assaulted and they intervened in the matter, none of*

*them has been examined in the case on hand. In our view, non-examination of these witnesses by itself would not affect the veracity of the prosecution case when the evidence of PWs2 and 4, the two injured eye witnesses who had received multiple injuries, has been found to be trustworthy and their evidence is corroborated by the informant PW 5 and supported by medical evidence as well as objective finding to the investigating Officer."*

**16.** It has been further held in **Babu Ram vs. State of U.P.; 2002 SCC (Cri) 1400** as under:-

*"It is was submitted by the learned counsel for the appellants that Ram Autar, an independent eye witness present at the scene of occurrence according to the prosecution case and a government servant has not been examined, and therefore, an adverse inference should be drawn against the prosecution. It is settled law that non-examination of an eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of the pen. An effort should be made at appreciating the worth of such evidence as had been adduced. If the evidence coming from the mouth of the eye witnesses examined in the case is found to be trustworthy and worth being relied on so as to form a safe basis for recording a finding of guilt of the accused persons then non-examination of yet another witness who would have merely repeated the same story as has already been narrated by other reliable witnesses would not cause any dent or infirmity in the prosecution case. In the case at hand we additionally find from the testimony of Ashrafi Lal that in spite of being a government servant and not involved in local village disputes he is afraid of deposing against the accused person and there is substance in the submission of the learned*

*counsel for the State that Ram Autar if tendered in the witnesses box would have followed the same track as was chosen by Asharfi Lal P.W.3."*

**17.** The learned counsel for the appellant further contended that there are certain discrepancies in the evidence of the prosecution and the evidence cannot be relied upon. It was pointed out that few of the witnesses stated that they were taking the tea when the accident took place. some of the witnesses stated that they finished the tea and the incident took place thereafter. It was further pointed out that there are witnesses who stated that they came to the shop to

purchase furniture. Some other witnesses stated that they came to the shop to purchase the furniture for them. It was further contended that there are certain contradictions in the statements, which were recorded under Section 161 Cr.P.C. they have changed their statement before the court below. The said discrepancies with regard to the statements under Section 161 Cr.P.C. have not been put to the Investigating Officer. As such the appellant cannot take the benefit of these discrepancies.

**18.** The observation differs form person to person and what one may notice, another may not. An object or moment might emboss its imagine on one person's mind whereas it might go unnoticed on the part of another. By and large the people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder. The

witness cannot be expected to pose a photographic memory and to recall the details of an incident. Ordinarily if so happens that witness is overtaken by the events, the witness could not have anticipated the occurrence, which so after has an element of surprise. ordinarily a witness cannot be expected to recall accurately the sequences of events, which took place in a rapid succession or in a short time of span. A witness is likely to get confused or mixed up when interrogated, later on.

**19.** As the person who has witnessed a incident, like the present one reacts in his own way. Some are stunned, some become speechless and some stand uprooted from the spot. Thus every individual reacts on his own way. There is no set of rules of natural reaction. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, the duties and the responsibilities of the courts have become much more. Now the maxim
**“let hundred guilty persons be acquitted but not a single innocent be convicted”**, is in practice, changing the world over and courts have been compelled to accept that society suffers by wrong convictions and it equally suffers by wrong acquittal.

**20.** If the contradictions are there it do not affect the prosecution story. The courts should not take into account such discrepancies, which are bound to come on the testimonies. The discrepancies as pointed out by the learned counsel for the appellant are not of such consequences, which can be named on the shoulders of the prosecution. As such I do not find any

substances in the contention of the learned counsel for the appellant.

**21.** The learned counsel for the appellant contended that the Investigating Officer has not taken the blood stained clothes and weapon into custody. It was further contended that the Investigating Officer only took the sample of soil and it was not sent for Chemical examinations. The learned counsel for the appellant further contended that the appellant is

entitled acquittal on the same score. The learned AGA refuted the contentions. It is well settled position of law that the testimony of the witnesses if found credible and cogent the defect on the part of the Investigating Officer cannot be taken into account. while dealing with this matter Hon. Supreme Court in **Dhanaj Singh @ Shera and others Vs. State of Punjab 2004 (3) SCC P-654,** has observed that in the instant case, the High Court found several disturbing features which indicated how the investigating officer had made out a new case to save the accused persons and to implicate the complainant party. Hence, the High Court analyzed the evidence of the eye witnesses with due care and caution. On finding the said evidence to be credible, the High Court upheld the conviction recorded by the trial court. Before the Hon'ble Supreme Court, the accused appellants challenged the conviction on the grounds (1) that the police after thorough investigation had concluded that it was the complainant party which caused the death of the deceased (ii) that the pellets, wads and cartridges were not recovered from the spot, (iii) that the weapons of assault and the pellets were not sent for ballistic examination, (iv) that the blood stained earth was not sent for chemical

examination (v) that many persons who could have thrown light on the incident had not been examined, and (vi) that the evidence being that of highly interested and inimical persons, should have been discarded. Dismissing the appeal, it was held by the Apex court that even if the investigation is defective, that pales into insignificance when ocular testimony is found credible and cogent. In

the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect. To do so would tantamount to playing into the hands of the investigating officer if the investigation designedly defective.

**22.** It was further contended that only one pellet was recovered from the place of occurrence and no other pellet was recovered. It is in the evidence that there are three injuries of firearm on the persons of the injured and only one piece of pellet was recovered from the place of occurrence. The Investigating Officer should have contacted the doctor as to whether there were any embedded pellet on the body or not. This is remissness on the part of the Investigating Officer, which does not help the appellant.

**23.** It has been held in **Chhotu Vs. State of Maharashtra 1997 CRI.L.J 4394 (SC):-**

> "That necessarily means that all of them were the most natural and probable witnesses to an incident that then took place near his house, notwithstanding the fact that they were not residents of that locality. It also requires to be mentioned here that if the

investigating officer failed to seize the bloodstained clothes of PWs 3 and 8 and to promptly examine PW3, whose names as any eye witness was disclosed immediately after the incident, it only indicates remissness on

his part but the evidence of PW3 and 8 was not in any way impaired thereby.”

**24.** The Apex Court has, while maintaining the conviction of the appellant in **Karnel Singh Vs. State of M.P. 1995 CRL.L.J 4173**, observed:-

*“Notwithstanding our unhappiness regarding the nature of investigation, have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In case of defective investigation the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation Officer, in fairness to the prosecutrix as well as the accused, would have recorded the statements of the two witnesses and would have drawn up a proper seizure-memo in regard to the Chaddi. That is the reason why we have said the investigation was slipshod and defective.”*

**25.** In view of the forgoing discussion I am of the view that if the Investigating Officer has not recovered the weapon and has not sent the soil for Chemical examination and has not taken into possession the clothes such remissness on the part of the Investigating

Officer is of no avail to the defence and the contentions of the learned counsel for the appellant has no force.

**26.** It was further contended that the incident took place all of sudden and the prosecution has not alleged any motive behind the incident. As such the entire evidence cannot be taken into consideration and the entire prosecution evidence is liable to be discarded and the appellant is entitled to be acquitted on this sole ground. The learned AGA refuted the contention. It is well-settled position of law that failure to prove motive for the crime is of no consequence if the role of the accused persons in the crime stands clearly established. The ocular testimony is very clear and convincing in this case. The illegal acts of the accused persons have resulted in the commission of the offence. It is settled law that establishment of motive is not a sine qua non for proving the prosecution case. Even if the prosecution had failed to prove the motive, the entire evidence cannot be discarded (See **Yunis@ Kariya Vs. state of M.P. (2003) 1 SCC 425)**.

**27.** It was further pointed out by the learned counsel for the appellant that the scribe of the report has not been produced by the prosecution before the court below. According to the report, it was written by Vijay Rana. Dhanveer Singh PW3 has stated in his evidence that it was written by him. It is well settled position of law that where the informant has not been examined before the court and even if the first

information report is not proved, it would not be a ground for acquittal. The submission of the learned counsel for the appellant is misconceived. It has been held in **Krishna Mochi and others Vs. State of Bihar, 2002 SCC (Cri.) p/1220**, that it has been further submitted that the informant, Satendra Kumar Sharma has not been examined as such, the first information report cannot be used as a substantive piece of evidence in as such as on this ground as well the appellants are entitled to an order of acquittal. The submission was totally found misconceived. Even if the first information report is not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by the prosecution. Therefore, non-examination of the informant cannot in any manner affect the prosecution case.

**28.** It was further contended by the learned counsel for the appellant that the appellant should have been put to the test identification as PW3 Dhanveer Singh has stated that the name of the appellant was not known to him prior to the incident but he has aware about his face. In the present case PW2 Meharban Singh and PW3 Dhanveer Singh stated that they knew the appellant earlier. This fact clearly reveals that there was no need for test identification, As such the contention of the learned counsel for the appellant is of no avail.

**29.** It was further contended that the prosecution has failed to prove the intention of the appellant to kill the persons. To constitute an offence under Section 307 I.P.C., an intention or knowledge relating to the commission of the offence. What is material is the intention or knowledge and not the consequences of

the actual act done of the purpose of carrying out the intentions. It is clearly contemplates that an act which is done with the intention of causing death. The intention or knowledge must be such as is necessary to constitute the murder. In absence of intention or knowledge it is necessary to establish ingredients of Section 307 I.P.C. In the present case PW2 Meharban Singh stated that the fire was made with intention to kill them. According to the Fir the fire was made only to kill Meharban Singh whereas Meharban Singh stated that it was fired with intention to kill all of them. The state of mind of the accused has to be detected from the surrounding circumstances. The circumstances reveal what was the intention of the appellant at that time. If the appellant fired upon the persons who were sitting there, the mental status of the appellant can only be inferred that the firing was made to kill the injured persons. The appellant fired upon all the persons. If the fired would have hurt at the vital part of the injured persons, it would have caused the death of the injured persons. The intention of the appellant was clear coupled with the evidence that the intention of the appellant was to kill the person who were sitting there.

**30.** PW5 Dr. J.C. Dhyani stated that the injuries were fatal and the condition of the injured was very poor. The injuries were dangerous to their life. As such the intention can be inferred from the injuries, which the injured persons sustained.

**31.** I have gone through the entire evidence on record and nothing could be elicited from the prosecution evidence, which renders the evidence

unreliable. Ocular testimony of the prosecution witnesses further stands corroborated by the medical

evidence. The prosecution has adduced the evidence of PW5 Dr. J.C. Dhyani who examined the injured persons on the same day and found gun shot injuries on their persons. According to the opinion of the doctor the injuries were caused by firearms and duration of the injuries was fresh, Thus, the nature of the injuries and the duration of the injuries also corroborate the factum of the incident.

**32.** The matter was reported immediately at the police station and a prompt FIR was lodged at about 12.10 noon on the same day. As such there was prompt FIR and there was no chance of any manipulation in the FIR. This fact also corroborated the factum of the incident.

**33.** In view of the above discussion I am of the view that the prosecution has established the guilt beyond any reasonable doubt against the appellant. I find that the learned trial court has rightly convicted and sentenced the appellant and there is no infirmity in the judgment passed by the trial court. Hence, the appeal is dismissed and the conviction and sentence awarded by the trial court against the appellant are confirmed.

**34.** Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within two months.

**(J.C.S. RAWAT, J.)**

Dated: 19-7.2005
**MPS**